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"DECLARED VALUE" AND EXCESS-PROFITS TAX UNDER FEDERAL REVENUE ACT

By Oscar Moss, of the Los Angeles Bar

OF all the new forms of taxation imposed by the Federal Government since 1933, none is more productive of uncertainty in the minds of corporate taxpayers than the liability under the Revenue Act of 1935 as amended, relating to excess-profits tax.[1] This indefiniteness is created because the tax liability under this section of the law is dependent on the original declaration of value made by a corporation (with specified statutory adjustments) in connection with its return of capital stock tax required to be filed by July 31st under the same Revenue Act,[2] which declaration once made cannot be changed.[3]

The counterpart of such fixed declaration or election in revenue laws does not readily come to one's mind, if indeed it ever existed before, although there are numerous instances where a taxpayer is compelled to make an election with respect to adoption of method for filing tax returns and for the filing of joint or separate returns. For example, beginning with the 1921 Revenue Act, and continuing up to the 1932 Act, affiliated corporations have had the privilege of filing either separate returns or a consolidated return, which option provision, while binding taxpayers to file returns thereafter on the basis chosen, nevertheless could have been changed with the consent of the Commissioner of Internal Revenue.[4]

Likewise, methods of accounting, such as cash, accrual, or installment, are other familiar examples of options given to a taxpayer in the filing of returns which bind him as to returns for future taxable periods, but which may be changed with the consent of the Commissioner. The nearest approach perhaps to the apparent finality of an election is the provision contained in Sec. 114(b)(4) of the Revenue Act of 1936, which requires the taxpayer to elect to have the depletion allowance in the case of coal, metal, and sulphur mines, computed either with or without reference to so-called percentage depletion. However, in none of the provisions cited has it been mandatory to make an election by which an assumed fact had to be adopted by a taxpayer as a basis for the future payment of taxes; rather such options usually pertained to methods of reporting statutory net income, primarily for the sake of consistency in the returning of net income from year to year.

The antecedent of the existing capital stock tax was in force from 1916 to 1926, while the excess-profits tax was a part of the Federal taxing system during the years 1917 to 1921. The Senate Finance Committee report on the revenue bill of 1921 recommended the repeal of the excess-profits tax, for reasons among others of the inequalities and manner in which it discriminated against corporations with small invested capital. There were, of course, other criticisms directed at this tax which, coupled with the fact that it was also losing productivity, resulted in the repeal of that particular tax law. In this regard it may be interesting to note that in his recommendation to Congress for 1936 tax legislation, the President suggested the repeal of the capital stock and excess-

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[1]Sec. 106 Rev. Act. of 1935, as amended by Sec. 402(a), 1936 Act.
[2]Sec. 105(d) Rev. Act of 1935, as amended by Sec. 401, 1936 Act.
[3]Sec. 105(f) Rev. Act of 1935.
[4]Rev. Acts 1921, 1924, 1926, Reg. 69, 65, and 62, Art. 632, and Rev. Act 1928 and 1932, Reg. 75 and 78, Art. 11.

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profits taxes and the substitution of other forms of corporate tax levy, but Congress in its wisdom did not see fit to enact into law such recommendation, but instead reenacted these two types of taxes in the 1936 Act.

SALIENT FEATURES

For the benefit of those who may be unfamiliar with the provisions of the law, it may not be out of place to state briefly the salient features of the taxes under discussion:

The capital stock tax is an excise tax imposed on every domestic corporation "carrying on or doing business" and on every foreign corporation "carrying on or doing business" in the United States. Corporations exempt from income taxes and life insurance companies are exempt under the law for all years, while corporations which did no business for any part of the year ended June 30, 1937, are exempt from tax for that year. The tax rate is $1.00 for each $1,000.00 of "adjusted declared value" of the capital stock of corporations subject to the law. Returns and payments are due on or before July 31st of each year, regardless of when the corporation's regular accounting period ends, since for capital stock tax purposes all corporations are taxed uniformly as of a fiscal year ended June 30th.

The unique feature of the present Act is, as has been suggested before, the basis upon which the tax is levied, namely, on the "adjusted declared value." The capital stock tax repealed in 1926 was based on the actual net worth of the corporation for the year preceding the date of the annual return, and was computed much the same as a prudent investor would evaluate the capital stock of a corporation for investment purposes. On the other hand, the statutory adjusted declared value under the present law need bear no relation whatsoever to the inherent worth of the corporate stock, since the taxpaying corporation may declare any value it may wish upon its organization, if the company was organized since June 30, 1936, or in case it was in existence prior to June 30, 1936, it had a right to declare a new value as of the end of the period for which its last previous income tax return was made on or before June 30, 1936, regardless of declared values on capital stock tax returns filed under prior laws.

The law also provides that for any subsequent year ending June 30th, the adjusted declared value shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by the applicable income-tax law over the amount disallowed as a deduction by Section 24(a)(5) of the Revenue Act of 1934 or a corresponding provision of a later Revenue Act, and (5) the amount

of the dividend deduction allowable for income purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income.

PROPER "DECLARED VALUES"

Before commenting further on the importance of establishing a proper declared value it may be well to mention the interrelationship of the capital stock tax to the excess-profits tax. The Revenue Act of 1935 imposes an excess-profits tax on corporations for years ending after June 30, 1936, at the following rates: 6% of the net income over 10% and not exceeding 15% of the declared value of capital stock, and 12% of the net income over 15% of the declared value. Corporations are subject to this tax for each income-tax taxable year in respect of which they are liable under Section 105, *supra*. In general, the 1935 Act, as amended by the 1936 Act, provides that for the purposes of the excess-profits tax the net income shall be the same as the net income for income tax purposes for the same taxable year, except that a credit is allowable against net income in the amount of 85% of dividends received from domestic corporations subject to the income tax. Accordingly, no deductions are allowable from the net income subject to excess-profits tax for such items as income taxes, capital losses in excess of $2,000.00, excess contributions, etc. In turn this has the effect of keeping up the adjusted declared value of the stock, even if the corporation sustains losses.

It may be evident from the brief outline of these two taxes that the "adjusted declared value" reported by a corporation for capital stock tax purposes is an all important consideration, since it forms the common basis for the imposition of both taxes. Because the effect of diminishing capital stock tax liability is to increase the liability for excess-profits tax, and conversely, an increase in the capital stock tax tends to decrease the excess-profits tax, a corporation is usually confronted with the necessity of making a choice whether to pay a higher capital stock tax and thus avoid excess-profits tax or to declare a reasonable actual value, pay less capital stock tax and let the future excess-profits take care of itself. Generally speaking, under present economic conditions, most taxpayers have considered it more advantageous to report a higher declared value on their capital stock than even their past earnings justified, since the penalty by way of tax on excess-profits is far more costly when the declared value is understated than the resultant capital stock tax when the declared value is overstated.

STARTLING RESULTS

The operation of these laws makes it especially difficult for new corporations having no earning experience, as well as for older companies whose income by the very nature of their business is subject to wide fluctuations, such as, for instance, the motion picture industry. In particular, the application of these statutes oftentimes produces starting results in the case of a corporation engaged in patent development or in the exploitation of natural resources, where the future net earnings are practically unpredictable.

Regulations 64 relating to the capital stock tax under Section 105 of the Revenue Act of 1935 as amended states:

> "In its first return a corporation may declare any value it desires for its capital stock, but a value once declared cannot be changed, amended, or corrected, and such value serves as the basis for the adjusted declared value of the capital stock for subsequent years and for the com-

putation of the excess-profits tax imposed by Section 106 of the Revenue Act of 1935."

Notwithstanding the apparent explicitness of the Act and the above-quoted regulations, it is interesting to note the case of *Oertel Company vs. Glenn,* 13 Fed. Supp. 651, decided February 10, 1936, now pending in the Circuit Court of Appeals for the Sixth Circuit. The case arose under Section 215(f) of the National Industrial Recovery Act,[5] similar to the present act, the issue turning on the proper construction of the following phrase in Sec. 215(f):

> "The adjusted declared value shall be the value as declared by the corporation in its first return under this Section (which declaration of value cannot be amended)."

The suit is based on the following facts: On July 13, 1933, plaintiff filed with the Collector its capital stock tax return for the year ending June 30, 1933, showing the total value of its outstanding stock to be $78,104,84 which was its book value. On September 1,1933, before the time had expired for filing the return for the current year, to correct an oversight and a mistake in the original, the plaintiff filed with the Collector a corrected return and showed thereon the value of its capital stock to be $828,104.84, determined by capitalizing earnings and including intangibles on the books. The Commissioner of Internal Revenue subsequently rejected the corrected return on the ground that no correction was permitted under the law after original filing. The plaintiff paid, under protest, the excess-profits tax demanded by the Commissioner and brought this action to recover the overpayment.

UNUSUAL LAW POINTS

The opinion of the District Court is quoted below because it raises unusual points of Federal tax law, which if upheld on appeal would be of far-reaching importance to all taxpayers:

> "To justify a tax, the necessary basis of fact must exist to invoke the taxing power to impose it. The Congress can make law apply to the facts; it cannot make facts apply to the law, nor can it delegate power to a taxpayer to do so. Many things are immutable and one is a fact; there is no power to change it. Disputes often arise as to what constitutes a fact, but the truth itself is indisputable.
>
> "The act here in question measures the tax according to the value of the capital stock of the corporation. The taxpayer is authorized under the provisions of the Act to declare the value, but this cannot be arbitrarily done; there must be a basis in fact for its conclusion. If the statute authorizes an arbitrary determination, it would be void for uncertainty. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the Fifth Amendment."

The Court in overruling the demurrer to the petition held that an erroneous declaration of value on an original capital stock tax return for 1933 could be corrected by an amended return if filed before an excess-profits tax return is due, and that no question of estoppel can arise until after the determination of excess-profits tax liability. Whether the higher court accepts the theory of law expressed in the foregoing opinion is just as unpredictable as the amount

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[5]c.90, 48 Stat. 195—26 U. S. C. A. ch. 18b, Sec. 1358a.

of excess-profits tax payable in the future by a corporation from the declaration of value for capital stock tax purposes.

A more recent case touching upon the subject under discussion is that of *Scaife & Sons Co. v. Driscoll,* decided March 12, 1937, where the Federal District Court for the Western District of Pennsylvania refused to hold Section 105 of the 1935 Act unconstitutional or to enjoin the Collector from refusing to accept an amended capital stock return tendered September 4, 1936, which increased the valuation declared in the original return filed July 29, 1936. The Court stated that the plaintiff had an adequate remedy at law for the recovery of any excess-profits taxes it might be compelled to pay, and referred to the Oertel case as an example of such a suit.

It should be remembered, however, that even if the ruling in the Oertel case is sustained on appeal, the decision goes no further than to enable a taxpayer to correct the declared value on a capital stock tax return only before the excess-profits tax return is due. Beyond that point there appears to be no relief in sight, unless by Congressional enactment a new declared value is permitted. It seems that even though in the case of a tax-free reorganization the new corporation resulting therefrom may have a new election and is not restricted to the declared values of the other companies involved in the reorganization, nonetheless the Commissioner may question the bona fides of the transaction if done for the purpose of reducing the capital stock tax or excess-profits tax.

William Tell Aggeler

RESOLUTIONS UPON THE LIFE AND SERVICES OF JUDGE WILLIAM TELL AGGELER.

WHEREAS, in this time of stress and storm we all are more confirmed in our faith in our Governmental foundation and system by the daily lives, examples and works of honorable, intelligent, impartial and sympathetic public servants engaged in the administration of justice under law;

Whereas, the useful and unostentatious public and private life of our departed friend and co-worker, Judge William Tell Aggeler, is a notable example of such service rendered by him during the past twenty-three years;

He was Chief Deputy Defender of Los Angeles County for seven years and Public Defender during the following six years, in the earlier part of which time the office of Public Defender and its worth were under test, and because of the outstanding service rendered by the office it became recognized as one of the most valuable organizations engaged in the administration of justice; in that work he assisted the poor and needy in the protection of their rights in both criminal and civil matters; he showed exceptional knowledge of human nature and of the just administration of the law, and proved that law is for the poor as well as for more fortunate citizens;

He was appointed to the Superior Court in 1927 and was elected twice thereafter by large majorities, serving in that position until his death which occurred on the fifteenth day of this month;

Nearly all of his work on the bench was in the criminal courts, and in that he showed exceptional knowledge of criminal law and procedure, and exercised in a marked degree impartial justice, discretion and consideration, and mercy where mercy was due;

His record is above criticism;

Judge Aggeler was a man of deep religious convictions and actively encouraged good citizenship and wholesome personal and religious belief, thought and action;

He was an exemplary husband and father and his children do him honor.

Therefore, Be It Resolved by the Board of Trustees of Los Angeles Bar Association for themselves and on behalf of all other members of the Association, that the passing of Judge William Tell Aggeler is greatly to be deplored; that he and his notable services to the public, his fellows at the bar and his family will long be remembered, his memory revered, and his worth not forgotten.

Be It Further Resolved that these resolutions be spread upon the minutes of this Board of Trustees, and that a copy thereof be delivered to Mrs. William Tell Aggeler as some evidence of the esteem of the Board of Trustees, officers and members of the Association for Judge Aggeler and his contribution to the just administration of the law and to public welfare.

Adopted by Board of Trustees, Los Angeles Bar Association, July 21, 1937.

COMMENTS ON THE WAGNER ACT

By Allan M. Carson, of the Los Angeles Bar

THE WAGNER ACT cases have been the subject of a flood of comment and controversy, a natural consequence of such a forward decision, one that moves the entire constitutional question of congressional power to regulate interstate commence up a peg, or down a peg—depending upon the viewpoint. Either way, the power has been undeniably broadened. Although the consensus of opinion among conservative members of the Bar appears to be that the Supreme Court decisions under the N.L.R.A. employ a strained line of reasoning, a general consideration of the present national picture leads to the conclusion that such reasoning was necessary—necessary because today national regulation of labor relations has become necessary. Governmental power must be centralized in order to deal properly and efficiently with the situation. The relation of employers and employees in industry today is not a state problem. The scope of industrial enterprise on one hand and the movement of labor towards a united front on the other have carried the question far beyond the borders of any single state. Present labor troubles and their extent show us clearly that this is a condition no one state may cope with successfully. It has become one of our great national problems and it must be dealt with nationally.

CONGRESS POWERS

The extension of the powers of Congress under the commerce clause as interpreted by the Supreme Court in the decisions under the N.L.R.A. is viewed as an encroachment upon state rights. Viewed from another angle, it is not such an encroachment. Labor relations in industry form a sociological problem pertaining to the entire nation and not to individual states. What the N.L.R.A. cases do in effect, is render an otherwise uncontrollable situation amendable to some form of legislative regulation. Before the decisions the national labor question lay in a legislative "no man's land." Beyond the power of the states to control effectively, it had not yet been placed judicially within the power of Congress. These decisions supplied the judicial approval requisite to the occasion.

It may be objected that the N.L.R.A. is an unwarranted encroachment upon individual liberty. This again depends on the viewpoint. On the side of the employees, greater liberty in collective bargaining for wages and hours is obtained. On the side of the employer, some liberty in the management of his business has been lost. Peace and happiness of the many depend upon some restraint of individual liberty of the few. If a humane purpose is served the restraint is proper. The N.L.R.A. is clearly a police measure. No express police power as such has been given Congress under the Constitution, but such power may be exercised if necessarily implied from the powers expressed. The implication which provides the authority for the N.L.R.A. may not only seem unnecessary but decidedly remote.

Be that as it may, such legislation is indicative of a trend which has been given considerable impetus under the present administration. This trend, however, grows as much out of present day circumstances as out of any presidential policy and will continue to grow even beyond the term of the present administration.

LIFE MORE NATIONAL

Our life will not become less national as time goes on, but more and more national. More and more of our problems will reach out beyond the borders of

the individual states, rendering it increasingly impossible or impractical for those states to cope with them. The world today has become a small place, our nation a smaller one. It is axiomatic to say that socially and economically our nation functions more as a unit today than it did at its birth.

The authors of the Constitution saw fit to lodge with Congress a power to regulate proceedings in bankruptcy. It is submitted that if those authors had been confronted with the same social and economic questions as are we today, Congress would have received many more such specific powers in the interests of uniformity and promotion of the general welfare of the nation. We shall one day be, if we are not already, confronted with a maze of national problems so complex and so far-reaching that legal ratiocination will no longer be able to set them within powers implied by the commerce clause or the tax clause of the Constitution. Yet the problems will remain to haunt us and the states will be powerless to lay the ghost.

WITHIN LAW'S GRASP

To take such questions out of the limbo of jurisdictional uncertainty and to place them within the grasp of the law, it would seem that the power of Congress to legislate upon questions truly national should be derived from some base broader than that afforded by the commerce clause and the tax clause. This does not mean that the states shall give up any of their sovereign power. The problems in question are today already beyond the power of any single state.

If I am not mistaken, it was originally proposed at the Constitutional Convention to give Congress specific power over all national questions, but such a power was considered dangerously broad. Would it be so now? A great many of us think so, but nonetheless we have our national questions and are forced to deal with most of them under strained constitutional constructions. Whether or not we want the Federal Government to assume direct control of our social and economic welfare we shall be forced to accept such control as a practical necessity. The most we can do is provide assurance of efficient administration through a properly constituted authority.

THE BAR PLEBISCITE

By Frank G. Tyrrell, Judge of the Municipal Court.

THE bar plebiscite on judicial candidates is variously considered. Its sponsors of course think it an entirely valid proceeding, the intention of which is to furnish information to the electorate, and help them in making a wise choice. Perhaps there are some who consider it an impertinence, and as an attempt by the bar to dictate to voters, and control the judiciary. Assuming that every lawyer who indicates his choice in the plebiscite, has given sufficient time to make his act intelligent and informed, that he votes conscientiously, free from bias or prejudice—and this assumption is justified—then every citizen should ascertain the result of the bar plebiscite, and take it into consideration in making up his judicial ticket.

Many times the majority of the bar are unacquainted with some of the candidates. In such case, they must inquire and investigate before voting; so that the plebiscite represents the unselfish, disinterested work of the men who vote in it, and should not be disregarded or lightly regarded. The few votes that are determined by considerations of personal friendship are not enough to affect appreciably the net result. It is fair to say, that while there may be an occasional injustice done to some worthy aspirant, nevertheless this vote of the lawyers serves as a faithful and accurate index to the character and ability of the candidates for judge. On the part of the bar, it is a disinterested, patriotic public service.

DUTY OF CITIZENSHIP

The voters in a populous center like that of greater Los Angeles are sadly at a loss when it comes to choosing among the candidates. The great majority perhaps never indulge in the luxury of a law-suit; they are unacquainted with the bar; or if they know them, they hardly feel competent, unaided, to make a wise choice. Requiring popular election of judges is only one of many instances in which the electorate are asked to consider and decide in matters that lie beyond their cognizance. The duties of citizenship have become burdensome in the extreme, and on men and measures the need is for light, and yet more light.

Taking it by and large, the bar plebiscite is an admirable device for furnishing the needed light. It is of course true that in every litigated case, one side must lose; but the instances when the loser becomes piqued and prejudiced against the judge thereby are few and far between. It still remains that the best judges of the qualifications of candidates for the bench are the practicing lawyers; they are schooled and experienced in the law, which to many a layman is a murky mystery. Hence their opinion is authentic and reliable, and if it were not volunteered, it should be and is sought after. What lawyer at the bar is not asked by some friend whom to vote for, in a judicial campaign?

This plebiscite affords help where help is much needed, and is a fine factor in reaching somewhat satisfactory results, as long as we elect our judges for short terms. Indeed, I see no reason why it might not and should not continue.

even if we were to change to some appointive system. Those delegated with the power of appointment would still need to inform themselves, or be informed and they would undoubtedly welcome the aid of the organized bar.

POLL OF JUDGES.

But judges themselves are not permitted to practice law; and yet they are asked to vote in the bar plebiscite. Then they are appealed to by the candidates for personal endorsement, and if the request comes from a colleague who is a candidate for re-election, it presents a somewhat embarrassing situation. For this and other reasons that might be mentioned, would it not be well to take a separate poll of the judges? Some additional work would be entailed, but not a great deal. And if, as would doubtless happen, the two polls agree, would there not be an added element of strength and persuasion in the result of the plebiscite? The fact that generally, incumbents are favored at the polls, properly interpreted, seems to indicate that the voters want capacity and ability on the bench, and they argue that one who has served there a number of years must be better fitted because of his experience than one who aspires for the first time. To be sure, it does not always follow, for the capacity to gain wisdom by experience depends on the individual. Judging from the recidivist in crime, there are those who wholly lack it. Nevertheless it is a more or less significant element.

It is to be hoped that the leaders of the bench and bar will combine to make the judicial plebiscite more searching, fair, comprehensive, adequate and influential. Its possible usefulness is beyond question.

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NATIONAL LABOR RELATIONS ACT

Editor's Note: This is the third and last, of a series of articles on the National Labor Relations [Wagner] Act, prepared by members of the Los Angeles Bar Association. The first installment appeared in the May Bulletin, under Jack W. Hardy's name.

By Thomas T. Inch, of the Los Angeles Bar

In 1916, Congress attempted to exclude from interstate commerce the products of child labor.[44] By a divided Court, the statute was held unconstitutional[45] because Congress, under the guise of regulating interstate commerce, was in fact imposing a police regulation on the States.

Although the Supreme Court has been unwilling to permit Congress to exercise jurisdiction and control over local industry—mining, manufacture, agriculture, et cetera, *per se,* in those cases where there have been recurring practices which "affect" the free "flow of commerce" between the States, the authority of Congress has been sustained.

Swift & Co. v. United States[46] is illustrative of this principle. That was a proceeding under the Sherman Anti-Trust Act wherein certain meat packers were charged with entering into a combination to refrain from bidding against each other at the livestock markets, to fix prices, to restrict shipments—in short, with attempting to create a monopoly. Livestock was consigned and delivered to the stockyards, not as a place of final destination, but for purposes of sale. In sustaining the prosecution the Court declared:

> "Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly, recurring course, the current thus existing is *a current of commerce* among the States, and the purchase of the cattle is a part and incident of such commerce." (Italics ours.)

By the Packers and Stockyards Act[47] Congress provided for the supervision by federal authority of the business of commission men and livestock dealers in the stockyards of the country. To the contention of the commission men that the Act was invalid as to them, since they were not engaged in interstate commerce, Chief Justice Taft, in rendering the opinion of the Court,[48] said:

> "The stockyards are but a *throat through which the current flows,* and the transactions which occur therein are only incident to this current from the West to the East and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed. . . . The sales . . . merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. . . . *The stockyards and sales are necessary factors in the middle of this current of commerce."* (Italics ours.)

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[44]Act of September 1, 1916, c. 432, 39 Stat. at L. 675.
[45]Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529 (1918).
[46]196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276 (1905).
[47]Act of August 15, 1921, c. 64, 42 Stat. at L. 159.
[48]Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 Sup. Ct. 39 (1922).

Stating that it was "impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current stock shipments declared to be interstate commerce in *Stafford v. Wallace*",[49] the Supreme Court upheld the constitutionality of the Grain Futures Act of 1922.[50]

SCHECHTER POULTRY CASE

Two other cases, recently decided, merit a brief discussion—not for the novelty of the legal concepts enunciated therein, but because the cases are cited frequently as being diametrically opposed to the decisions in the "Wagner Act cases". The constitutionality of the National Industrial Recovery Act was passed on in *A. L. A. Schechter Poultry Corp. v. United States.*[51] The evidence showed that the defendant poultry dealers received their poultry from outside the state and then slaughtered and sold it to local retail dealers and butchers. The Court concluded that the transactions here involved were not *in* interstate commerce, nor were they in the *current* or *flow* of commerce.[52]

> "The *interstate transactions in relation to the poultry then ended* . . . Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. . . . *So far as the poultry here in question is concerned, the flow in interstate commerce had ceased.* The poultry had come to permanent rest within the State. . . . Hence decisions dealing with a stream of interstate commerce . . . and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." (Italics ours.)

The question of whether defendant's transactions directly "affected" interstate commerce was answered in the negative.

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. . . . Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. . . . The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

Carter v. Carter Coal Co.[53] determined the unconstitutionality of the "Bituminous Coal Conservation [Guffey] Act".[54] The purpose of the Act, by its terms, was to stabilize the bituminous coal-mining industry and promote its interstate commerce. After declaring that coal-mining was not "commerce", Mr. Justice Sutherland, in delivering the majority opinion, cited with approval the *Schechter case,* stating:

"In the Schechter case the flow [of commerce] had ceased. Here it had

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[49]Board of Trade v. Olsen, 262 U. S. 1, 67 L. Ed. 839, 43 Sup. Ct. 470 (1923).
[50]Act of September 12, 1922, c. 369, 42 Stat. at L. 998.
[51]295 U. S. 543, 79 L. Ed. 1587, 55 Sup. Ct. 837 (1935).
[52]Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276 (1905); Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 Sup. St. 39 (1922).
[53]298 U. S. 238, 80 L. Ed. 1160, 56 Sup. Ct. 855 (1937).
[54]Act of August 30, 1935, c. 824, 49 Stat. at L. 991.

not begun. The difference is not one of substance. The applicable principle is the same."

DIRECT AND INDIRECT EFFECT

The distinction between direct and indirect effect of intrastate transactions upon interstate commerce has been recognized frequently in prosecutions under the anti-trust laws. Where a combination or conspiracy with intent to restrain or monopolize commerce has existed, the effect has been held to be direct, and the rule has been applied to labor organizations[55] and to business enterprises[56] without distinction. Conversely, where the intent is absent, and the objectives are limited to intrastate activities, the fact that there has been an indirect effect on interstate commerce does not subject the parties to federal regulation.[57]

An examination of the cases above cited reveals a factual distinction between them and the "Wagner Act cases". In some of those referred to the issues raised did not include any consideration of the extent or nature of the affirmative congressional authority to regulate commerce. The issue raised in such cases was—is the state action a burdening or an obstructing of inter-

(Continued to page 370.)

[55]Local 167 etc. v. United States, 291 U. S. 293, 78 L. Ed. 804, 54 Sup. Ct. 396 (1934); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 69 L. Ed. 963, 45 Sup. Ct. 551 (1922); Loewe v. Lawlor, 208 U. S. 274, 52 L. Ed. 488, 28 Sup. Ct. 301 (1907).

[56]Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276 (1905); Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 Sup. Ct. 384 (1922).

[57]United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 66 L. Ed. 975, 42 Sup. Ct. 570 (1922); United Leather Workers v. Heckert, 265 U. S. 457, 68 L. Ed. 1104, 44 Sup. Ct. 623 (1924).

WHAT PRICE CORROBORATION!

By Jacob J. Lieberman, of the Los Angeles Bar

(AUTHOR'S NOTE: This is a short story, with a moral directed at the Committee on Code Amendments. The Committee on Bulletin Index may list it under Divorce, Fiction, Fancy and Frenzy.)

IT was a swift courtship. Spring had turned the fancy of both the young man and maiden to thoughts of love. Soon June came, and with it the Mendelssohnian strains which have accompanied so many couples up the church aisles.

Love's young dream kept them happy for some months. Soon a blessed event was expected. Her cup of bliss was ready to overflow. But, strange to say, he was not so happy about it. During that period when she needed the tenderest care and the most solicitous consideration, she observed the cooling of his ardor, a listlessness and lack of interest, soon leading to frequent absences. Complaints were met with insults, inquiries were answered with abuse, importunities were greeted by insults, attentions were repulsed, tenderness was converted into temper, caresses into cuffs, blessings into blows.

But friends showered their attentions on the young couple. Company came to their home frequently. Invariably they left with praise for the marked consideration, the courtesy, the interest, the attention, the helpfulness displayed by this young husband to his wife. How happy she must be, cried the bride's girl friends! If they but knew! No sooner had the door closed upon the guests than the smooth, oily cloak was dropped and the "kindly and helpful" husband became a brute!

But why details? This is written for lawyers. Any lawyer of experience can fill in the details aptly.

PIQUED PRIDE.

The young bride's pride was piqued. She just could not admit failure. She could not reveal her chagrin. She could not even confide her disappointments and fears. So, she suffered in silence. Even beatings, which came in time, did not alter her course. Finally, neglect, repeated and frequent absences, aroused suspicion. Prodded, the young husband one day admitted a series of infidelities. Friends then began telling her of various circumstances, leading to but one conclusion: that the admission was true.

What to do? Her health had suffered. Pride was pocketed at last. She consulted counsel. All the harrowing details were recounted for the benefit of a sympathetic attorney. Did she have sufficient ground for divorce? Of course! Plenty! No judge would hesitate granting her a decree. A perfect case! "Come in next week," said the lawyer, "I want to talk to friend husband in the meantime."

Talks with the husband were to no avail. Counsel soon became convinced that divorce was the only alternative. So, he prepared the complaint. Its details and composition made it a model for a complaint for divorce on the grounds of cruelty (both physical and mental) and adultery. He sent for his client.

"Here's the complaint. Read it and sign the verification." It was duly verified. "Now," said Mr. Lawyer, "we're ready to file it. But, first, let me ask you for the names of your corroborating witnesses. Let us go over the complaint, allegation by allegation, and see who can corroborate the various charges."

Ah, but you've missed the point of this story, my dear reader! I can hear some lawyers now exclaiming: "Why didn't he ask that in the first place?" The very question he asked himself! An undue sympathy for the little woman and a well-warranted impatience and disgust with the husband had made the lawyer deviate from his usual custom and act first.

REAL POINT.

The real point of his story, however, is found in Sec. 130 of the California Civil Code, reading, as you doubtless recollect:

> "Sec. 130. *Divorces not to be granted by default, etc.* No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers."

So our hero lawyer reads this to our suffering and beaten heroine, and says: "We must have corroboration in a divorce action, corroboration."

And, as he looked upon the stunned countenance of the poor young thing before him, he could not tell whether the expression was one of stupidity or stupor, or bewilderment, so he reiterated, forcefully, vehemently: "Yes, yes, corroboration; we must have corroboration!"

As the full significance of the lawyer's revelation dawned on the young wife, hysteria possessed her, and as she alternated between laughter and tears, she cried: "Just think of it! Corroboration! *Imagine a man, particularly a smooth, villainous type of man,—parading his cruelties and adulteries in public, or revealing them to his neighbors!*"

Do we believe in divorce in this state, or are we opposed to it? If opposed, then why not repeal our divorce laws in toto, or limit divorce, as it is in New York and England, to the ground of adultery? If we believe that other grevious conduct justifies dissolution of the bonds of matrimony, then, why, in heaven's name, deny it to those who are perhaps aggrieved most?

Oh, comes the reply, we want to prevent collusion! Is there anyone in the practice so naive as to contend that the mere requirement of corroboration prevents collusion?

After all, the plaintiff is required to be in court and testify under oath, in order to obtain a decree. (And we require a year's wait for the final.) Must we impute perjury to a plaintiff under oath? Or, does the law, perchance, desire two perjurers? The presumption of the law is that one who takes an oath is telling the truth. Why, then, not accept the sworn testimony of the one, and relieve real hardship? Or, will the cynic say, "Well, the presumption is a most violent one!" "Well," I ask, "does the cynic have any more faith in the oaths of two?"

Some have told me it's the ecclesiastics, or those whose religion prohibits divorce, who are responsible for this law. I cannot believe that those whose religion alone deters them from divorce will insist on a law inflicting their belief on others whose religion does not prevent divorce. Or, if there be any such, then our code provisions are proof that they are in a decided minority.

Moral: There really ought be a law about that! A repeal of the law requiring corroboration in divorce cases. Let's be consistent. If we believe our statutory grounds of divorce are proper, then let's grant the relief where needed. Let's not deny it in the hardest cases.

JUVENILE COURT COMMITTEE STUDIES PLACEMENT INSTITUTIONS*

By Charles E. Beardsley, Chairman, 1936-'37 Committee

DURING the year just finished the Committee on Juvenile Court work has continued with its policy of acting as a stand-by committee for the Juvenile Court Judge, and the major portion of its activity has been in attending to matters referred to it by Judge Robert H. Scott.

MEMBERS' STUDY OF INSTITUTIONS

Another line of activity has been the study of individual members of the Committee of the institutions affiliated with the Juvenile Court. Several Committee members have made trips to the Preston School of Industry, to the Sonoma State Hospital, to County Forestry Camp No. 10, and to various other placement institutions to which the Juvenile Court is sending children who are made wards of the Court.

As a result of these individual studies and of Committee discussions, we feel that the members of the Committee have become more familiar than ever before with the machinery of the Juvenile Court.

JUVENILE COURT LEGISLATION

Early in the year the Chairman consulted with Judge Robert Scott regarding the need for amendments to the law with reference to the Juvenile Court. It was Judge Scott's opinion that since the laws were to be codified at the 1937 session of the Legislature, it was better not to attempt any major revisions at this time, but to wait until the new code was formulated and then seek such amendments as might be necessary in the codified law. On the basis of this recommendation, no proposed bills were drafted by the Committee or submitted to the Legislature.

However, just before the close of the first session of the Legislature, Judge Ben Lindsey submitted to the Committee a proposed bill, which was later introduced as Senate Bill No. 584. The Committee spent many hours in the study of this proposed legislation, both as a Committee of the whole, and in sub-committee. Final action on that legislation was contained in a report which was approved by the Board of Trustees in the week of April 5. That report recommended against the adoption of Judge Lindsey's bill at the current session of the Legislature. The report was sent to the members of two Senate Committees, and the passage of the proposed legislation was blocked.

It is the opinion of the Committee that legislation along the lines suggested by Judge Lindsey should be carefully studied by the Bar Association Committees on Juvenile Court work during the coming two years, with a view to submitting better considered and more universally acceptable suggestions for enlargement of the powers of the Court to the next session of the Legislature.

APPROPRIATIONS FOR THE JUVENILE COURT

The Committee has conferred with Judge Scott and has backed up his suggestions for improvements in the equipment and personnel of the Juvenile Court and related institutions at various times during the year, and it is our opinion that this is one of the lines of activity in which such Committees can accomplish the most in aid of Juvenile Court work.

*Report of Chairman of the 1936-'37 Juvenile Court Committee to Board of Trustees.

SPEAKERS

Individual members of the Committee have filled a very large number of speaking engagements which have come to Judge Scott and which he has been unable to take care of himself. In each of these instances the speakers have told of the interest of the Bar Association in Juvenile Court affairs, and it is the opinion of the Chairman that this activity on the part of members of the Committee has been of very great value from a public relations standpoint, both to the Juvenile Court as an institution, and to the Los Angeles Bar Association.

SPECIAL INVESTIGATION

The Committee conducted a special investigation of complaints about brutality and corporal punishment at the Whittier State School. As a result of this investigation and the action of the Committee, the employee of the Whittier State School who had been responsible for the offense in question was dismissed, and in this instance, again, the Committee was able to be an effective aid to the Judge of the Juvenile Court and to make the weight of the Bar Association as a civic group felt in a worthwhile cause.

MATTERS PENDING

One member of the Committee, Mr. Edward J. Olstyn, made a very careful study of the proposed state-wide probation system. As a result of that study, an excellent report was prepared by this Committeeman, which report is being handed, together with a copy of this annual report, to the new Chairman of the Juvenile Court Committee. Judge Scott has emphasized the importance of this proposal for a state probation system, and the Committee believes that Mr. Olstyn's investigation and report may be very valuable in formulating the policy of the Committee and of the Bar Association on that proposal.

There is still pending the work of the Committee in support of Judge Scott's attempt to secure adequate space for the placement of Los Angeles County juveniles in state institutions. Director Harry Lutgens of the State Department of Institutions, has met with representatives of the Committee and has been advised of the willingness of the Committee to support him in requests for additional funds from the State Legislature to meet the placement needs of this and other counties. Undoubtedly the new Committee will continue its interest in and attention to this proposal.

UNLAWFUL PRACTICE NEWS

Massachusetts: A 13-point decree drawn by Attorney General Paul A. Dever setting forth the limitations upon which a collection agency may operate in Massachusetts was accepted and entered by Supreme Court Justice Henry T. Lummus recently.

This decree is one of the final steps by Dever to drive collection agencies out of Massachusetts. More than 404 out of 456 collection agencies in Massachusetts have, either through court action or the pressure of Dever, suspended business in that state, according to Maurice M. Goldman, assistant attorney-general.

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Georgia: The Supreme Court of Georgia in *Gazon vs. Heery* decided July 3, 1936, and reported in 187 S. E. 371, in a case involving the qualifications of the Chief Judge of the Municipal Court of Savannah, Georgia, who under the law "must have practiced law for five (5) years or more," had the following to say regarding what constitutes the practice of law:

> "What is meant by the 'practice of law' as applied to fitness for the exercise of judicial functions? So far as we are aware, no precise definition of the term 'practice of law' has been made by this court, except that it was said in *Boykin v. Hopkins,* 174 Ga. 511, 512, 162 S. E. 796, that 'The practice of law, as that term is commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. Practicing law, according to the laws and customs of courts, is the giving of advice or rendition of any sort of service when the giving of such advice or rendition of such service requires the use of legal knowledge or skill.' * * * The practice of law is not limited to the conduct of cases in court. * * * Any advice given to clients, or action taken for them, in matters connected with law, is practicing law. * * *."

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New York: In *People v. Globe Jewelers, Inc.,* decided December 11, 1936, the Supreme Court of New York, Appellate Division, First Department, through Martin, P. J., rendered the following opinion:

> "The paper sent out by the appellants, in size, arrangement of details, employment of large type and general appearance, is similar to that of a summons. The printed matter is in the nature of a mandatory precept directing the doing of an act, to-wit, the payment of the money. In this respect the paper simulates a writ. The employment and placement if the words 'State of New York' and 'County of New York,' and the affixing of a large, red seal, enhanced the effect of the paper and made it appear as though it was issued by a court. * * *
>
> "The testimony indicates that the appellants considered the form used much more effective than letters. Why did they consider it more effective? Obviously the intention was that the recipient would believe that it was a court process, and it is our opinion that the average layman would so regard it. There can be no doubt about the intent and purpose of the defendants in preparing and sending a paper similar in appearance to a Court writ.
>
> "The judgment of conviction should be affirmed."

OPINIONS BY BAR COMMITTEE ON LEGAL ETHICS

THE Committee has been requested to render its advisory opinion in response to an inquiry which is substantially as follows:

A member of the State Bar who for some time has not been actively engaged in practice, has been employed for five months by a "Credit Store" as a credit and collection man. The employer wishes to appoint the attorney in question as representative in the Small Claims Court, which duties would be in addition to his general employment as a credit and collection man.

It is presumed that as representative of the employer the attorney would be expected to conduct litigation in the Small Claims Court. Whether or not the "Credit Store" is a corporation is not disclosed.

Query: Is the procedure above outlined ethical?

Sections 117 to 117(r), C. C. P., inclusive, which constitute and establish the Small Claims Court indicate clearly that these courts are designed for the layman. Section 117(g) contains the following language:

> "No attorney at law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the Small Claims Court. * * *."

It is apparent that the statute itself disposes of the question for us as to all persons with the possible exception of cases in which a corporation is a

party. It would appear that defendants are at a disadvantage when denied counsel if the plaintiff be represented by an attorney, no matter how the attorney's employment may be designated. An attorney is always an attorney. He cannot step out of character by calling himself a credit man, or by any other title. The fact that an attorney is an officer or employee of a corporation does not entitle him to represent such corporation in the Small Claims Court.

While this question is a mixed one of law and ethics, and its legal implication should not be passed upon by this Committee, it is difficult to separate the two aspects of it. The language of the statute is plain and the spirit of the entire act creating the Small Claims Court appears to require that all litigation therein be conducted by laymen.

The Committee is of the opinion that it is unethical for an attorney to appear or attempt to appear in the Small Claims Court for any purpose, with the possible exception of those cases in which the attorney himelf is a party.

* * *

INQUIRY has been made as to whether or not, in the opinion of this Committee, it is proper for an attorney to take a case on a contingent fee basis, and for the attorney to pay the court costs of litigation.

The Committee is of the opinion that an agreement for compensation on a contingent fee basis is proper when not prohibited by law. (C. C. P. 1021.) Contracts for contingent fees are allowed only in order to make it possible for persons without means to urge a meritorious action or a defense. (*Newman v. Freitas,* 129 Cal. 283.)

A distinction must be made between payment of costs and advancement of costs. Canon 42 provides:

> "*Expenses of Litigation:* A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

It is apparent from a reading of the above canon that the payment of costs by an attorney would be improper.

* * *

THE opinion of the Committee is requested by an attorney with reference to the following facts:

A, an attorney, represented three minority stockholders of a corporation in effecting a compromise and settlement of a dispute with the majority stockholders. Thereafter *A* was retained as attorney for the corporation. The same minority stockholders have now retained *B,* an attorney, to represent them in effecting the settlement of certain other claims against the corporation and against the same majority stockholders involved in the former dispute. *B* now requests *A* to submit to his inspection certain documents and other information acquired by *A* during his former employment by the minority stockholders concerning the subject-matter of the former dispute. He is not asking *A* to divulge any information acquired by him during the course of his employment by the corporation. We are asked whether *A* may properly give the desired information to *B.*

It is fundamental that an attorney must not disclose to another the confidences of a client or former client, obtained during the course of his employment, without his client's knowledge and consent (Canon 37). Were it not for the fact that *A* is now employed by the corporation in which his former clients are minority stockholders, there would be no doubt but that *A,* with the

consent of his former clients, would be at liberty to give *B*, their present attorney, the information he desires. To what extent is this conclusion altered by reason of A's present employment by the corporation?

It seems apparent that the subject matter of *A's* previous employment by the minority stockholders is to some extent at least the same as that of *B's* present employment by them, since *B* considers *A's* information to be material to the prosecution of their present claims against the corporation, *A's* present client. Under these circumstances, *A* could not properly accept employment from the corporation to defend the contemplated action, since such employment might adversely affect the interests of his former client in matters "with respect to which confidence has been reposed." (Canon 6; Rule 5, Rules Prof. Conduct.)

Obviously, *A* could not with propriety disclose to his present client the information now sought by *B*. In our opinion, *A's* duty also precludes his disclosing information obtained from his former clients to aid them in litigation against his present client, the corporation. If he may not accept employment in a matter adversely affecting the interests of his former clients, it seems equally clear that he cannot, with propriety, testify or give information which would adversely affect the interests of his present client.

A has likewise been requested to permit *B* to inspect certain documents obtained by *A* during the course of his previous employment by the minority stockholders. If these documents are, in fact, the property of his former clients and delivered by them to *A*, it is *A's* duty not only to permit inspection, but to deliver them to *B* on request, but beyond this he may not go for the reasons already stated.

NATIONAL LABOR RELATIONS ACT

(Continued from page 361.)

state commerce? In determining this question it was held that on the facts presented the activities sought to be regulated by the state were *not* commerce, but matters of local, intrastate concern and therefore, within the domain of state action. The subject regulated was not commerce but was only preceded or succeeded by commerce, and, the regulation was so remote or indirect in its effect on interstate commerce that the question of "affecting" commerce, for one reason or another, was not before the Court.

In other cases cited, the question has been—is the legislation under consideration a valid exercise of the affirmative power of Congress to regulate interstate commerce? Although the activity or condition was of an intrastate character, it was found to be so intimately bound up with interstate commerce as to have the *effect* of burdening or obstructing interstate commerce, and therefore was within the confines of the federal regulatory power over commerce. In this latter group, the question is necessarily one of degree. The existence of a constantly recurring practice which threatens to burden unduly, or to restrict the free flow of commerce may be the subject of federal regulation. Where, however, the effect upon interstate movement is indirect or remote, the activity is beyond the pale of congressional control.

The "Wagner Act cases", as distinguished from one class of cases herein discussed, involved the validity of federal regulation, and not state action. The question of how far Congress may go in determining what is necessary to regulate commerce or to protect its free flow from burdens and obstructions is not the same as how far the state may go in the regulation of its local concerns without so encroaching upon the plenary and exclusive national power over commerce. "The power to regulate commerce is the power to enact 'all appropriate legislation' for its protection and advancement."[58] Since the power is plenary, it may be exerted to protect that commerce against dangers from whatever source derived.

Factually, at least, the subject cases may be distinguished from the *Schechter case* and the *Carter Coal Co. case;* whether the Supreme Court did so is a moot question. In the former cases, federal power was attempted to be exercised over commodities which had ceased their interstate movement, and in the latter, the commodities were at rest before interstate commerce began. In the "Wagner Act cases" the regulation was of industries in which materials were received through interstate commerce, were processed or fabricated, and then continued in the flow of interstate commerce, without coming to permanent rest. Regulation occurred in the second stage, for, as the Court held, labor disputes at *that point* would directly *affect* interstate commerce. Finally, in the *Schechter case* the *effect* upon interstate commerce was so remote as to be with-

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[58]National Labor Relations Board v. Jones & Laughlin Steel Corp., ... U. S. ...., 81 L. Ed. 563, ... Sup. Ct. ..... (Decided, April 12, 1937.)

out the federal power, and in the *Carter Coal Co. case,* not only was the *effect* on commerce found to be remote and indirect but there also had been an improper delegation of legislative power and a violation of "due process."

PRACTICAL CONCEPTION

"Interstate commerce" is itself a practical conception, and interferences with that commerce must be judged in the light of actual experiences. Whether or not there is an *effect* upon commerce depends upon particular facts.

> "Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern."[59]

Given the *effect* upon commerce, the power to regulate lies with Congress, for "it is the *effect* upon commerce, not the *source* of the injury, which is the criterion" for determining the validity of the particular exercise of the federal authority.

It is undoubtedly true that the Wagner Act apparently permits of governmental control over private enterprise to a degree hitherto unknown in the United States. It is equally true that no part of our heritage is more jealously guarded than that of personal liberty, and anything which appears to challenge those rights which constitute it is openly regarded with strong suspicion and ill favor lest it be an initial step toward the nullification of those rights. It is not surprising, therefore, that the "Wagner Act cases" have precipitated an avalanche of criticism and pessimistic prophecy for such has always been the immediate reaction in those instances where federal control has been extended to situations theretofore assumed to be beyond the scope of federal authority. The Sherman Act, the Pure Food and Drug Act, and many others led, at the time, to bitter

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[59]National Labor Relations Board v. Jones & Laughlin Steel Corp., ... U. S. ...., 81 L. Ed. 563, ... Sup. Ct. ..... (Decided, April 12, 1937.)

commentaries. After *Champion v. Ames*[60] upheld the Act of 1895 by which Congress forbade all transportation of lottery tickets in interstate commerce, such use of the commerce power was condemned, it being said:

> "This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government . . . and to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply."[61]

In *Wilson v. New*[62] the Supreme Court upheld the right of Congress to fix wages and hours of labor in order to keep alive the flow of interstate commerce during a period of emergency created by the World War, and many comments resulted as to the danger created by the Court's recognition of this "extension" of Congressional power.

POLICY AND POWER

The significance of these facts is that one is likely to confuse the question of policy with power. There would seem to be some merit in the thought that were we not embroiled in a period of conflicting socio-economic theories, and were the accepted motive of the Wagner Act that it was to foster the expansion and free flow of commerce to aid in or secure the maintenance of economic prosperity, perhaps the concern over the Wagner Act would not be so widespread. As *Hammer v. Dagenhart*[63] set one limit on the commerce power may we not reasonably expect some case yet to be decided to prescribe a limit to this new exercise of power? Nothing in the Wagner Act decisions precludes this probability, for the Court clearly recognized that the line must be drawn somewhere and that cases yet to arise will establish this demarcation.

Flexibility has ever been a cardinal principle of constitutional interpretation. It has been said: "To the decision of an underlying question of constitutional law no . . . finality attaches. To endure it must be right."[64] Hence, as experience and social growth transpire, new situations and new interpretations of constitutional law in the light thereof must occur. The solution lies in an enlightened political and social philosophy in the exercise of the power of government, and not in reliance upon the judiciary to deny the existence of the power in every instance where the wisdom of the exercise of that power may be open to question; otherwise, the very evil sought to be avoided may result.

PORTENTS OF ACT

Immediate concern, as has been stated, must be with the reality of the present—what are the portents of the Act? What California businesses and industries formerly deemed purely matters of local concern are to be held subject to federal regulation and control in view of the facts of the "Wagner Act cases"? What of the motion picture industry where film, cameras, developing materials and machinery are imported from other States, and the completed pictures distributed throughout this country and the world? What of the citrus industry where its products are packed in containers made from imported materials and subsequently shipped in interstate commerce? What of the local

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[60]188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321 (1903).
[61]Hardwick, Thomas W., "Regulation of Commerce Between the States," Amer. Bar. Ass'n. Rep. (1917).
[62]243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298 (1917).
[63]247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529 (1918).
[64]Warren, Charles—"The Supreme Court in United States History," Vol. II, p. 749.

publications with local circulation which use paper and newsprint from without the State? What of the oil industry, dependent as it is on imported steel tools and pipe for the production of oil which is shipped in the channels of commerce? Will the aviation industry be able to escape the application to it of the reasoning of the Court in these cases? Are stores, whose stocks are principally from out of the State; are any or all of these subject to the terms of the Wagner Act and the jurisdiction of the National Labor Relations Board?

ULTIMATE LIMITS

The ultimate limits to which the Courts may go in permitting the National Labor Relations Board to regulate industrial relations on the theory that a business "affects" interstate commerce is not now determinable. It may be well to call attention to present limits designated by the Court. In the *Schechter case* the Court denied Congress the power to regulate a business whose products had come to rest in the state after their interstate carriage had ended. And in the *Carter Coal Co. case* the Court declared that federal power to regulate did not attach until interstate commercial intercourse began.

It appears to be the fact, however, that the Board is assuming jurisdiction over all enterprises which utilize interstate commerce or its facilities in connection with their operations and it would appear to be the wise policy to approach problems arising under the Act on their merits instead of relying solely upon constitutional issues until the courts, by a series of decisions, circumscribe the sphere within which federal control of private industry may lawfully operate.

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